UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v. 17 Cr. 548 (JMF)

JOSHUA ADAM SCHULTE,

Defendant.

Conference

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New York, N.Y.
June 8, 2022
12:30 p.m.

Before:

HON. JESSE M. FURMAN,

District Judge

APPEARANCES

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
BY: DAVID W. DENTON JR.
MICHAEL D. LOCKARD
Assistant United States Attorneys

JOSHUA ADAM SCHULTE, Defendant *Pro Se*

SABRINA P. SHROFF
DEBORAH COLSON
Standby Counsel for Defendant

Also Present: Harry Rucker, CISO, Department of Justice

THE COURT: Let's confirm with the CISO that everyone present is authorized to be here.

MR. RUCKER: Your Honor, everyone present is authorized to be here, and the court is closed for classified proceedings.

THE COURT: That means that nobody here should have any electronic devices other than what the CISO says is permissible. And with that, we'll proceed.

I'm just giving you fair warning I have a hard stop and time of about 2:20 or so today, 2:30 the latest. So in that regard, we're going to need to potentially triage and deal with what needs to be dealt with today.

I guess actually apropos of that, let me ask you, Mr. Denton, what are the issues of most timely concern on your end so that we can prioritize those and take it as it comes. If we can get through everything, great, but I think we need to prioritize what needs to be resolved today.

MR. DENTON: I think the most significant are the 6(c) rulings with respect to the issues there that are pending and then the 6(a) rulings on the defendant's new Section 5 notice, and CIPA requires those to be made before the proceeding -- i.e., trial -- so I would say those should get priority. And then witnesses would be the next thing after that.

THE COURT: Mr. Schulte, from your standpoint, does that sound right?

MR. SCHULTE: I think we should start with the supplemental 10 and work from 10, starting there.

THE COURT: All right. That is one of the issues that I think Mr. Denton was alluding to. I think we'll have plenty of time to get through that stuff. I'm going to take it in a slightly different order. Let me start with the 6(c) issue or motion with respect to --

Just a reminder. First of all, is the courtroom locked, or do we need to lock it?

MR. RUCKER: I'm going to make sure of that right now, your Honor.

THE COURT: All right.

Since we don't have any microphone, if everybody could make sure to keep your voices up for the benefit of me and the court reporter and everyone else, that would be great.

I'm going to start with the 6(c) motion with respect to, for lack of a better way to describe it, other classified information that the defendant knows. In my Section 6(a) opinion, I had held that the fact that Mr. Schulte knows other highly sensitive classified information may be relevant and admissible to rebut the government's argument or suggestion that his conduct in the MCC counts was motivated by a desire to start a quote/unquote information war. See ECF No. 825, at 20-21.

In response, the government moved pursuant to Section

6(c) to substitute a stipulation to that effect in lieu of the specific classified information referenced in the CIPA Section 5 notice dated January 28, 2022. The government proposed a stipulation in its May 31, 2022, submission. I'm inclined to think a stipulation is appropriate but would propose a slight variation on it.

Mr. Schulte, do you wish to be heard, since I don't think I got a response from you on this issue?

MR. SCHULTE: I don't think I've ever received this letter, proposed stipulation. It was from what date?

THE COURT: May 31.

Mr. Denton.

MR. DENTON: I think we delivered this through the CISO, your Honor, to the courthouse SCIF. We certainly did not file it *ex parte*.

MR. SCHULTE: We don't -- we don't have -- there was never a copy sent to the SCIF.

THE COURT: All right.

Mr. Denton, do you have a copy there; could you maybe show Mr. Schulte?

MR. SCHULTE: Judge, this is a very substantial filing. I think I'm going to need more time to be able to read through it.

THE COURT: OK. I have to say I'm a little frustrated in the sense that I believe the government's deadline on this

was May 31, and to the extent that you hadn't gotten it, one would have thought that you would make that known to me no later than last Friday, when we were together. Be that as it may, I guess we'll address what we can. If you can focus for the moment on page 2 to the top of page 6, which is the issue I'm raising now -- knowledge of other classified information. If you want to quickly review that, then we can discuss it.

MR. SCHULTE: Does the Court want me to read this now?

THE COURT: Yes. Yes. Bottom line is we're three days before trial. We don't have the luxury of a day here, a day there. If you hadn't received this on May 31, when the government filed it, you had to tell me, and you had to tell me certainly on Friday that you never received the government filing, since you had every reason to expect that the government would make that filing. So I suspect that it's sitting in the SCIF, and to the extent you hadn't seen it, you needed to tell me. It's June 8. We're starting trial on June 13. I need to resolve these things, and I need to resolve them before trial. So read pages 2 to the bottom of 5. It's not that much material. I don't think this is a particularly complicated issue. I'll just tell you how I propose to resolve it, and then hopefully we can work our way through this.

MR. SCHULTE: So, I don't believe the stipulation is appropriate here. The language is not, including -- you know, this includes additional information that's not been written

down in the defendant's notebook. It doesn't really discuss the specifics, specific categories that I outlined in the CIPA 5. And I note that the CIPA 5 was kept generic to keep this information in the generic terms so it wouldn't be, couldn't really compromise any specific operations.

But specifics, when the government witnesses testify, some of the cross that I would be eliciting would be operations -- for example, something to the effect of, you know, [redacted] So this type of information that I specifically outlined in the CIPA 5 but also kept it generic, I think that is much more -- you know, this single stipulation doesn't really cover all the different types of information. And it's so -- you know, it doesn't -- it doesn't really, it doesn't give me the same, substantially the same defense as being able to elicit this from every witness, different types of information that they know that they either worked with me directly on or that they know that I helped, assisted certain operations.

So to that degree, I don't think that this really includes that same information and provides me with substantially the same ability to make the defense that I otherwise would do. And like I said, I'm open with working

with the government to make sure this stuff is generic enough that even they can agree to it. I've never said anything about specifically saying certain operations or doing -- or discussing anything specific that the government would oppose. I've always been of the mind-set that we should reach some kind of -- we can reach some kind of agreement as to the generalities of the types of work that I did.

THE COURT: All right. Well, I disagree. I don't think the particulars of the information, even the categories, let alone the particulars are relevant to the arguments that you wish to make. But what is relevant is that you were privy to information, other national defense information, potentially even more classified or damaging information that you're not accused of leaking or attempting to leak.

I will note the government has flagged as a concern [redacted] So in that regard, I suppose if you were to testify, whether and to what extent the government can elicit that remains to be seen. But certainly if there's any need to sort of cure any misleading impression, we'll take that up as it comes. But bottom line is the government's application for a stipulation is granted under Section 6(c).

Having said that, I'm inclined to think that the proposed language that the government has provided potentially can be improved upon. I'll put it that way. I think my concern is that additional information that had not been written down in the defendant's notebooks could be read to or heard to suggest that the information in the defendant's notebooks is national defense information, which, of course, is a question for the jury to decide. And in that regard, the stipulation should not put a thumb on the scale of that issue and should be neutral. I would propose the following:

"The parties dispute whether the information the defendant is accused of disclosing or attempting to disclose in connection with Counts Three and Four is 'national defense information.' As I will explain to you at the conclusion of the trial, that is a question for you to decide, but both parties agree that as a result of the defendant's employment at the Central Intelligence Agency, he was privy to sensitive national defense information not at issue in this case, the disclosure of which would be extremely damaging to national security."

I also think to the extent that Mr. Schulte is proposing to elicit testimony on this from witnesses, that at a level of generality, I wouldn't think there's a problem with him saying to a witness, isn't it correct or you understood or knew that I was privy to additional information that was not

leaked in the WikiLeaks leak, isn't that correct, or something to that effect. But again, I think the particulars of either the categories, let alone the specific information, there's no relevance to that, and it wouldn't be admissible and obviously highly damaging. I think that is consistent with the stipulation approved in *United States v. Wilson*, referenced by the government.

Mr. Denton, do you wish to be heard on that? Any views on that proposed stipulation?

MR. DENTON: I don't think so as a substantive matter, your Honor. I would actually propose, though, perhaps bifurcating it into two different steps, the first being the factual stipulation; that's sort of line 2 about the defendant being privy to the additional information, which I think probably it makes sense to offer as a stipulation and have read by one of the parties, as appropriate. And then perhaps it's appropriate, when that happens, for the Court to give the first part as an instruction to the jury.

I'm not sure that that piece should really be coming from the parties, and I'm not sure the factual points should really be coming from the Court. So that would be my proposal, to do the factual stipulation, and then the Court can note that the question of what is or is not NDI is for the jury to decide as per your instructions at the conclusion of the case.

THE COURT: I think that probably makes sense and is a

good point.

Mr. Schulte.

MR. SCHULTE: I disagree. I think it reads like an instruction. I think it's better to have it together, like the Court initially read it.

THE COURT: All right. I think Mr. Denton's point is well-taken. The first really is an instruction that, as phrased, is an instruction, so should be provided as an instruction. To the extent that this is a stipulation that would be a substitute for the classified information that Mr. Schulte has noticed, it really should be limited to the facts, which are the second portion. So with that modification, that's the stipulation that I will approve as an adequate substitute, and I find that it would provide Mr. Schulte with substantially the same ability to make his defense as would disclosure of the specific classified information, given that the specific classified information that he noticed is not actually relevant; it's the general proposition that is relevant. So that resolves that issue.

MR. SCHULTE: One second. One question, Judge, is there a way -- one more time, could you read what it would read?

THE COURT: Yes.

MR. SCHULTE: Just so we can have it.

THE COURT: Well, you can also get the transcript:

"The parties agree that as a result of the defendant's employment at the Central Intelligence Agency, he was privy to sensitive national defense information not at issue in this case, the disclosure of which would be extremely damaging to national security."

(Counsel and defendant conferred)

MR. SCHULTE: Yeah.

I think a suggestion about the, you know, he was privy to sensitive info not at issue in this case, you know, instead of saying not a subject of the alleged leak in this case.

THE COURT: Mr. Denton.

MR. DENTON: So, my hesitation there is a factual one, your Honor, in that the attempt charge in Count Four, it is very much the government's position that that was an inchoate and intended to be ongoing offense. So I think our preference would be for the Court's original phrasing.

MR. SCHULTE: They didn't charge it as an ongoing offense, and they haven't named this, all the information, or the extremely sensitive information th4t I'm privy to, they never, none of that, they never even alleged that that was intended to be transmitted.

(Counsel conferred with defendant)

MR. SCHULTE: Nor could they argue that, even if they wanted to.

THE COURT: All right. What about the following as an

alternative -- and let me also be clear, to the extent we are wordsmithing, I'm happy to let you guys, if it doesn't materially alter the substance of the stipulation, try and work out these sorts of wordsmithing things between yourselves. But what about "he was privy to sensitive national defense information beyond what he is charged with disclosing or attempting to disclose in this case, the disclosure of which," etc.? That seems like an accurate statement, probably actually more precise than what my original was.

Mr. Denton.

MR. DENTON: That's fine with the government, your Honor.

THE COURT: Mr. Schulte.

(Counsel conferred with defendant)

MR. SCHULTE: Yes, I think we're OK with it, but to the degree that, you know, the parties want to --

THE COURT: Can you keep your voice up.

MR. SCHULTE: I said, yeah, I think that sounds all right, but to the degree that the parties want to, like you said, engage in any wordsmithing that doesn't change the overall meaning, we may take that up.

THE COURT: OK. Great.

With that, why don't we turn to the government's Section 10 notice.

Mr. Denton, you've got Mr. Schulte's response taking

issue with the timeliness of it, and in particular, he alleges that he was not provided notice of the particular statements that you're now relying on and that that essentially deprives him of having prepared to meet the government's case. That's one issue.

The second that I raised upstairs is that the double jeopardy-type issue relating to Hickok, and to the extent that Judge Crotty found that the evidence wasn't sufficient to support that issue at trial, in the first trial, is the government precluded from proceeding on that theory in trial No. 2? I'll look at those cases that you've cited in your prior submissions. I haven't had a chance to since we were together this morning.

Do you wish to be heard on those two issues?

MR. DENTON: I don't think I have anything other to say on the second, other than what, I think, we set forth before. I think that there is no double jeopardy issue here. That's been addressed by the Court and by the Second Circuit. I don't think there's any -- there's not just no basis; there's been an affirmative rejection of the idea that the double jeopardy clause has an evidentiary effect. So I think that should resolve that issue. But as I said, that's really been set forth already for the Court.

With respect to the Section 10 notice, I think as a substantive matter, we disagree that it represents some sort of

expansion; that this is information that is all contained in pages that were discussed extensively. And in fact, there's a long record in the immediate runup to the prior trial of Judge Crotty specifically asking for the identification of why specific pages were relevant, what they went to with respect to the NDI at issue in this case. So each of those pages was identified, discussed, presented in court. There was testimony about the sensitivity of these things.

Our goal here is not to expand it but rather to be very specific about the particular aspects of NDI that the government intends to argue about, none of which were public or publicly acknowledged as of the time of the leak. And so I think our goal really was not to expand this in any way but to hopefully apply some precision in the hope of narrowing the scope of the 6(a) and (c) issues that we needed to continue to grapple with.

THE COURT: Can you point me to somewhere in particular, either the prior Section 10 notice or the -- I refer to it as a bill of particulars, but I take your point that it wasn't technically a bill of particulars filed before the first trial, but would have put Mr. Schulte on notice that these were sort of fair game with respect to these counts?

MR. DENTON: Sure, your Honor.

So, I think if you look at the government's -- it's the supplemental Section 10 notice from January of earlier this

year. Again, perhaps this could have been more precise, but the government identified that Schulte intended to disclose classified information relating to the national defense concerning the name and purpose of a CIA tool [redacted]

[redacted]

[redacted].

So we then took that and went, in the new Section 10 notice, and said, OK, here are the exact lines that are referencing that, and on which pages of which government exhibits, which I think is, you know, that's more precision. That's not an expansion.

THE COURT: So your position is that you previously provide notice of basically the category, now you're zeroing in on particular statements as a way of obviating the public disclosure concern that we've been grappling with, is that correct?

MR. DENTON: That's correct, your Honor.

I would also say Section 10 does not sort of prescribe a form of notice. It requires notice. I think in this case -- but again, the defendant is well on notice of what the NDI at issue is because we had a whole trial about it, and there was a lot of testimony in which people looked at these pages and talked about what was sensitive in them and not.

THE COURT: And was there testimony in that trial about the sensitivity, in essence, the NDI nature of these

particular pieces of information or statements?

MR. DENTON: I would have to go back and look at each and every one of them, but certainly they were all introduced, and I think by and large there was. I can't say I've done a --

MR. SCHULTE: That's not true.

THE COURT: Mr. Schulte, hang on, please.

Go ahead, Mr. Denton.

MR. DENTON: Again, I'd have to go back and run through the transcripts, but we showed these pages to a number of witnesses and asked them about them and what the consequences would be.

THE COURT: Mr. Denton, do you have a copy of your January Section 10 notice? I'm not sure I have a copy of it here. If I do, I'm not finding it immediately.

MR. DENTON: I think I do, your Honor. Trying keep straight which version is which, your Honor.

THE COURT: I think I've found it.

Mr. Schulte.

MR. SCHULTE: Yes.

So, first, to correct the record, Judge, these two things that they're trying to introduce now, which is part (b) on page 4 of their new supplemental notice, and page 6, which is (c) -- so (b) and (c). So at the first trial, this information was not introduced as national defense information --

(Counsel conferred with defendant)

MR. SCHULTE: Oh, (b) and (d).

This information was never introduced in the first trial as national defense information. The government never argued this stuff was national defense information. They introduced redacted and substituted portions of some of this, and they argued for relevance that it's showing state of mind, but they never argued this was national defense information. In fact, if you go -- after the trial was concluded and we filed our Rule 29 motion, the government, when they argued against it, they outlined only the specific things that they told us all along.

So if you look at the -- starting with the April 29, 2019, bill of particulars, they specifically state what exact information from the notebooks that they claim to be national defense information. And then in the CIPA Section 10 notice, they specifically state these exact same documents -- these exact same documents and statements again.

When we went on to trial, this was the only information that we were noticed on.

At the summation, the government only alleged those specific parts of the notebook that they claim to be national defense information from their bill of particulars and CIPA 10.

When the trial concluded, on the Rule 29 motion, the government only argued these same specific examples from the

notebooks, and that's all they've ever argued.

And then when they filed the recent CIPA 10, I just went through -- or the first CIPA 10 here, the government states, specifically on page 3, "with respect to the MCC charges, the national defense information is," and they outline it -- one, here it is, very specifically. It's the same information about the [redacted] information that they said at the first trial. The second thing, here it is -- again, you look it, the same language from the bill of particulars. Here, it is talking about Hickok. And then No. 3, here, again, they talk about "Malware of the Mind." It's the same information, again, that they provided in the bill of particulars in the initial CIPA 10.

So all this information has always been the same ever since the, from the first trial. Now, all of a sudden, the government is trying to say, oh, well, we weren't specific the first time, but five days before trial, we're going to specifically introduce all this new information that has never before been litigated before in CIPA 10, not at the first trial, not in the bill of particulars, not in the Rule 29 and certainly not in their CIPA 10 notice that they gave to the Court in January.

So I think -- and I think the statute's very clear that the government has to notify portions of the material that are reasonably expect to rely on to establish national defense

information element of the offense. So there's no -- I was not given proper notice of this information. If I had been, then I would have sought a CIPA 5. I would have had a completely different CIPA 5. We would have gone through CIPA 6, all kinds of litigation that this new notice requires.

So I think the law is pretty clear here that they're not allowed to, all of a sudden, that they realize that their case is weak and they have to get rid of the [redacted] thing, that they're, like, well, let's supplement and add some stuff in that we never noticed before on. I think that's just absurd and, I think, definitely unfair and certainly didn't provide me notice under CIPA 10 and arguably haven't even provided me notice as far as you would typically get in a defense, in any other, regular case, where the government would have to provide sufficient notice for the indictment. They haven't noticed any of this information before.

THE COURT: All right. To be clear, it's paragraphs (b) and (d) that you're objecting to, is that correct?

MR. SCHULTE: Section -- section (b), as in boy, and section (d), as in dog.

These things, you won't find these references in any single page in the -- all the way up until now, nothing in the first trial at all. I mean there's nothing in the bill of particulars, Rule 29, CIPA 10. Nothing anywhere. This is the first time that this information has ever been noticed by the

government as NDI.

THE COURT: And these come from government exhibits at the first trial, though, is that correct, 806 and 809?

MR. SCHULTE: That's correct. So, some of this information, what the government did, they went through CIPA 6, and they argued that some of this information was classified and should be redacted. But we specifically argued at those CIPA 6 hearings relevance, and we argued against that. But the government was -- very specifically said that they don't intend to introduce this as NDI and so they want to redact it and substitute it to make it unclassified.

So that was the result of the CIPA 6. The government specifically said we don't intend to introduce this against him as NDI so we will redact or substitute that. So Judge Crotty agreed that insofar as the government was not going to allege that this was NDI, then those redactions and substitutions were permissible under CIPA.

THE COURT: So these portions were redacted from 806 and 809?

MR. SCHULTE: There were redactions and substitutions, that's correct.

THE COURT: Mr. Denton.

MR. DENTON: Those are not inconsistent, your Honor. All of the components of (c), which the defendant does not object to, are also redacted because the particular point is

that this was undisclosed information. And so, for example, instead of identifying [redacted], they're identified in redacted portions as a tool identified in a vendor report after extensive litigation over whether what specific tool from what vendor in what report was necessary to reach these conclusions.

Same thing with respect to operations information, the conclusion was the fact of the operation was what was relevant, and so they're substitutions simply to substitute just operation for some of this. And so in those circumstances, the entire point of the Section 6 process is that it is not necessary to disclose the actual national defense information; that there can be substitutions that are appropriate, that protect things that have not been disclosed but nevertheless allow the parties to make arguments about their sensitivity and potential for harm to national security, and so on.

THE COURT: All right.

MR. SCHULTE: The point here is that they specifically said that they're not going to introduce it, and that's why the substitutions and redactions were allowed. Otherwise, we were arguing that we wanted to introduce so we could have a defense and be able to argue that it's not national defense information. But the government specifically said that they did not intend to introduce it as national defense information, and that's the only reason that Judge Crotty authorized the

redactions.

And just to be clear, he was reading section (c), which is not the new section. The new sections are (b) and section (d). Those are the ones that the government has never before stated are national defense information.

THE COURT: Can you just elaborate on what the prejudice is to you. Let's assume for the moment that this is the first time they're noticed. What would you have done to prepare a defense with respect to these particular portions had you had more notice?

MR. SCHULTE: Yeah. So if I had more notice, then I would have -- first of all, we would have had to go through CIPA 66(a) and (c), and I would have argued that this information shouldn't be redacted so that I can go and be able to -- first of all, so it wouldn't be prejudicial, and second of all, so that I can then file CIPA 5 to seek declassification of related information.

THE COURT: Right. I'm asking you to specify what that would be. I understand what the statute, the scheme is, but what meaningfully would you have done had you been noticed in January?

MR. SCHULTE: You're talking about the CIPA 6 or the CIPA 5?

THE COURT: Well, under CIPA 5, you would have to notice anything that you would wish to use.

MR. SCHULTE: Yeah, that's correct. So I mean we would seek declassification of -- we would require specific information regarding the operation. And the source code here, for section (b), they're saying parse MSFT and NTSF. So this stuff is something that I wrote at my house and wrote and brought it in. This stuff is not sensitive, and so we would seek to declassify [redacted], because that specific code I wrote was labeled unclassified. Right? And so we would basically seek that source code from the CIA [redacted]

And also, you know, we would have to go through the discovery to see what's available, because this type of information hasn't been -- the government would also have additional discovery obligations based on the information here in section (b). So, you know, there would be additional discovery. We'd need more information, and then also, I'd be able to conduct substantial research on the internet to be able to pull -- this is actually MFT, not MSFT -- MFT and NTFS to pull the forensics, to pull the Microsoft. It's actually from the Microsoft's own website on how this information works. We would have my expert be able to, start to research and look into this to testify about it as well.

THE COURT: And what about paragraph (d)?

MR. SCHULTE: Paragraph (d) --

(Counsel conferred with defendant)

MR. SCHULTE: OK. Yeah, just a couple minutes, Judge.

(Defendant conferred with counsel)

MR. SCHULTE: So, you know, counsel brings up a very good point, that if we were provided this notice, we would have a substantial time to be able to sit down and go through things.

That being said, some of the information -- for example, [redacted] this stuff has been publicly -- like it says here, it's publicly available and is acknowledged. So being able to do research on that; potentially there would be some CIPA 5 declassification for operations related to that, for example, when those took place and when they were no longer being conducted.

As far as the [redacted] you know, the government would have to produce discovery to show whether or not this is actually true and to what event -- I mean to what degree and how much, you know -- so there's a lot of discovery that the government would do, would owe us here. And this is specifically why the government decided not to, and decided to redact this information and keep it out, because they would have had to disclose what the [redacted] The government can't just say, oh, this is NDI. They have to provide us discovery. They have to be able to -- and then we would have the opportunity, once we receive that

discovery, to determine what additional information we need or declassification of some of these operations.

Some of these operations, for example, were not sensitive, and overall, Judge, we would need the time to be able to go through and analyze this and, you know, provide the CIPA 5 notice and provide -- and have research from our expert looking into this. It's just -- overall, the notice is just, you know, it doesn't comply with the, it doesn't comply with the statute. They can't just give us, give supplemental notice now. The statute's very clear that they have to do it by the time specified to give us time to go through these CIPA litigations.

THE COURT: Mr. Denton, you're certainly welcome to address Mr. Schulte's arguments about prejudice, but I think that he makes some valid points, and Section 10 does require that the government to notify the defendant by the deadline, which passed in January, of the "portions of the material that it reasonably expects to rely upon to establish the national defense or classified information element of the offense." It's just not clear to me that the particulars identified in paragraphs (b) and (d) were previously noticed, and the fact that they were redacted in the first trial sort of underscores that. It does seem like the fair thing at this point might be to preclude the government from relying on those in this trial.

MR. DENTON: So, again, your Honor, I think, first of

all, we sort of disagree with the premise of the idea that the fact that they were redacted is either a reflection of the government forgoing them or of there not being any notice.

The point is that, as with essentially every aspect of this trial, the conclusion that Judge Crotty reached is that there's no circumstance in which the specifics of a CIA operation are relevant to this case. But for purposes of NDI, the association of the CIA to an operation is a sensitive fact, and the disclosure or attempted disclosure of that can be sort of framed in that context. It's a bit rich for Mr. Schulte to say that he would be entitled to discovery on whether things he wrote down were true or not, but that's neither here nor there, because the specifics, again, everyone agreed were not relevant.

I think honestly, your Honor, there is a question about the level of specificity. There's no question that the defendant knew exactly what pages. It's not like we went back to the notebook and pulled out other things. These are the exact things that were introduced before. The question is just what is the scope of permissible argument about that. There was certainly quite a bit of discussion at the previous trial about the MFT, MSFT, that block in (b), because the government was not going to forgo a phrase that started "if you need help, ask WikiLeaks for my code."

So there is certainly discussion to be had, admissible

purposes for this information, and it all was admitted. So like I said, I think the only question is what is the government allowed to argue from given where we are?

THE COURT: I guess the question I have, the problem I have is I wasn't the judge at the first trial, so you referenced what happened at the first trial and also what these exhibits looked like at the first trial and I don't have those in front of me. It does seem to me that it turns on whether Mr. Schulte could have reasonably known that the government would rely in the manner that it is now seeking to rely on these statements. So I'm open to your suggestions and also thoughts on how to resolve this. But it seems like at a minimum, I need to look at whatever trial transcript pages you think this stuff was previously discussed and what form the exhibits took in the last trial.

MR. DENTON: Can we just have one moment to confer quickly, your Honor?

THE COURT: Sure.

Yes, Mr. Denton.

MR. DENTON: Your Honor, I think at the risk of narrowing this even further, our purpose here was not to expand the scope of what the government was going on argue was NDI but rather try and carve a path to narrowing the 6(a) and (c) issues. And I think honestly, those are -- of the NDI that remains that is most complicated with respect to (b) and (d).

So I think at this point, your Honor, to the extent that it gets us to resolving the issue that we were actually hoping to resolve, I think we're prepared to at this point also forgo (b) and (d) not as evidence in their evidentiary form. I mean they've been redacted; there are admissible portions of it. I think we may very well make argument about them, but to the extent that we're talking about what the NDI is and how that affects the 6(a) and (c) analysis, you know, there's no real dispute that parts 2(a) and (c) were, you know, long properly noticed, and those are sort of factual in a way that I think makes resolving the Section 6 issue simpler. So for the record, I guess we'll say that we will not rely on (b) and (d) even though we think we properly could.

THE COURT: OK.

Mr. Schulte, focusing then on 2(a) and (c), you had suggested upstairs that you were of the view that some of that was in the public WikiLeaks disclosures as well. Maybe it wasn't 2(a) and (c) you were referring to, but what's your position on that? If not, or if you can't point me to where in the classified exhibit it exists, I'd be inclined to think that that does moot the 6(a) and (c) issue that we've been grappling with and that as long as the government is proceeding only on these, and we would make that clear somehow to the jury, then it moots the issue that has been bedeviling us.

MR. SCHULTE: Well, I think there's two -- one issue

is the Hickok issue, which is not 2(a), but the section right above 2(a) talking about EDG, COG and Hickok. So, Hickok is definitely released in the WikiLeaks disclosure, and most importantly, the CIA provided me the Hickok user guide unclassified. So I think that's the big argument there. The Hickok stuff has been disclosed by WikiLeaks. The CIA actually labeled -- this came in as exhibit at trial. I think it was 616. The user's guide it gave to me was labeled unclassified.

And as far as the number of people go, the government has their unclassified search warrant that states the number of people. That's where this is coming from, citing the search warrant.

THE COURT: Clearly, you can introduce unclassified evidence at trial, so if you have the user guide that was unclassified, I think Judge Crotty cited that in his opinion --

MR. SCHULTE: Correct.

THE COURT: -- clearly you can introduce that and argue from that that this isn't NDI. So, too, if there's a government document that includes the same number of employees, you can make the same argument. The question is, is there anything in the WikiLeaks disclosure that -- to the extent that you want to argue prior public disclosure, is there anything in the WikiLeaks disclosure that technically remains classified that you would need to make that argument with respect to -- you're correct -- it's paragraphs 1, 2(a) and 22(c).

MR. SCHULTE: Yes, the one -- I noticed this in my CIPA 5. So my very first CIPA 5, I cite all the references to Hickok from the WikiLeaks disclosure. So there's no -- so for this one, for the Hickok disclosure, I don't think there's any public internet site -- I mean there are, but I'm not intending to introduce any public internet sites, just the WikiLeaks disclosure itself. And I cite those in the CIPA 5 for declassification.

THE COURT: And my understanding is that, in paragraph 1, the government represents that information regarding the number of employees in the two groups -- that is, in EDG and COG, I think - and Hickok's connections to DevLAN had not been publicly disclosed. Your position is that those things are publicly disclosed in the WikiLeaks leak?

MR. SCHULTE: That's correct. The number of people may not be. I have to double-check that. But definitely the connection between EDG and COG, all the information about Hickok, all that is throughout the WikiLeaks disclosure.

THE COURT: And that's in your first Section 5.

MR. SCHULTE: The very first one, yes, where I cite all the websites and the specific pages from WikiLeaks.

THE COURT: Mr. Denton.

MR. DENTON: Your Honor, the government quoted the exact language. The defendant cites a number of pages. They're all duplicates, so it's not like there's a number of

separate references to Hickok. They're just multiple versions of the same page. That's the only reference there.

THE COURT: The only reference is the "Jira sits on Hickok, which is shared between us and COG"?

MR. DENTON: That's correct, your Honor.

THE COURT: And what is that? Can you translate that?

MR. DENTON: So, Jira is the issue-tracking component of the Atlassian suite. It sat on Hickok, which was a physical server, "which is shared between us" -- the page doesn't specify that Atlassian was used by EDG, so I think that's a fair inference, "and COG."

THE COURT: And can you translate that?

MR. DENTON: COG is the cyber operations group. It's a different component of the Center for Cyber Intelligence.

THE COURT: That I understand.

MR. DENTON: Oh. Sorry.

THE COURT: What is the classified or NDI nugget in here that you think was not disclosed? That Hickok is connected to DevLAN?

MR. DENTON: Both that Hickok is connected to DevLAN and also the number of employees across the two groups.

THE COURT: OK.

Mr. Schulte.

MR. SCHULTE: So I think the government's incorrect that all these notes are one Vault 7 page. I think there are

duplicates, but I think that there are -- I remember there's at least three or four separate pages specifically detailing information about Hickok. So I just -- I don't think this is correct from the government.

I don't have the CIPA 5 before me or the pages from WikiLeaks, but I'm fairly certain -- and even this statement here, "Jira sits on Hickok, which is shared between us and COG," I mean that -- that -- what that means is that it's between DevLAN and COG [redacted] network. There's no other way to interpret that.

THE COURT: OK.

Mr. Denton, your thoughts on how to proceed here. Obviously, none of us have Mr. Schulte's first Section 5 notice, let alone the WikiLeaks pages.

MR. DENTON: We don't have it here, your Honor. I think we had previously provided the Court with a binder that contained all of those pages. We went through it ourselves in this. I think the Court may be able to do the same, or Mr. Schulte can identify where specifically we should look. But I think, you know, that's really all there is. This is the place we are.

THE COURT: And your response to Mr. Schulte's last point, which is, in essence, that the fair interpretation of the line that "Jira sits on Hickok, which is shared between us and COG," that that is in essence a way of saying that it's

connected to DevLAN?

MR. DENTON: Well, that's only true if you have a bunch of other information, like Mr. Schulte does. The presence of COG's network [redacted] is not revealed there and would not be known to someone on the outside. The fact that Jira was connected to Hickok -- or, sorry, that Jira was on Hickok connected to DevLAN as opposed to an entirely separate network is not an inference that would be obvious to someone who did not have insider knowledge of how the systems were set up.

MR. SCHULTE: I mean the problem is, you know, this is taking this out of context. When you're actually looking at the site, it's talking about DevLAN and specifically saying -- you know, when you take it out of context like this, the problem is, you know -- I don't know if what the Court would like me to, perhaps on Friday I can put the specific examples and send it to the Court or, what. But, you know, citing a single sentence from one of the, like, four or five pages is not sufficient here for the government.

THE COURT: OK. Well, I guess that is what I would like you to do, which is to say, recognizing that the government is withdrawing 2(b) and (d) and is now prepared to limit its theory of Counts Three and Four to what is set forth in the remainder of this notice, unless Mr. Schulte persuades me and points me to something in the WikiLeaks disclosure that does publicly disclose anything in paragraph 1 -- and I'll take

a look at the specific page cited by the government, but unless Mr. Schulte persuades me that there is such a 7hing, then I'm inclined to think that the government's revised approach does moot the 6(a), 6(c) issues that we've been grappling with because it is limiting its theory to things that were not previously disclosed in the WikiLeaks leak and, therefore, technically remain classified even if publicly disclosed.

MR. SCHULTE: Sorry. I just wanted to raise one point. This was just one of the issues. All the other ones have the same issue.

Do you want me to do that for all of them as well?

THE COURT: When you say all the other ones, what are you referring to.

MR. SCHULTE: I'm saying the remainder of the -- the remainder of the NDI and 2(c) NDI, you know, we were just looking at the Hickok thing, which is the first thing here. The other thing, 2(a) and (d), those all also have implement -- those also have stuff from WikiLeaks, from the WikiLeaks disclosure as well.

It's all in my CIPA 5, so what I can do is just print the pages and highlight the information and send it to the Court on Friday, for all this information.

THE COURT: Whatever form you want to submit it to me, the more specific the better for my purposes.

MR. SCHULTE: OK.

THE COURT: Unless you're able to point me to something that does appear in the WikiLeaks leak that would constitute a prior public disclosure of this, I don't think there's an argument to be made on that front, and there would be no need to disclose any classified information defending against the charge on the grounds of its prior public disclosure. And for that reason, I think it would moot the 6(a), 6(c) issue. That's my tentative ruling, but it's subject to revision in the event that Mr. Schulte, on Friday, points me to something in the WikiLeaks disclosure that does, in fact, disclose some of that information that the government maintains was not publicly available.

All right.

MR. DENTON: Your Honor, if I may say just one thing on that?

With respect to 2(c), which talks about the tool Bartender, the government does not dispute, and has not disputed, that the tool Bartender is disclosed in the leaks and is referenced there. The specific classified information, the NDI, which the government expects and did previously elicit testimony about, is the association of that CIA cyber tool with [redacted] So the fact of Bartender's revelation in the leaks is not what we're relying on. It's the connection. (Continued on next page)

THE COURT: Understood.

With that understanding, Mr. Schulte, you can try to point me to specific references in the Wikileaks leak that is his prior disclosure, if you will, to those alleged NDIs, but if you can't, then it moots that issue.

Let me turn to the classified Michael memorandum. Mr. Schulte submitted a letter, I think dated June 6, concerning the memorandum, maintaining that it's not double hearsay. That's demonstrably false. There are a bunch of statements in the memorandum attributed, for example, to Michael, some of which are clearly hearsay, double hearsay, that is hearsay within hearsay, and for that reason Mr. Schulte is just wrong in claiming that there is no double hearsay problem. I had invited him to identify with specificity portions that he maintained were not double hearsay and that he wanted to use, and having failed to do that, I think there is no basis to offer the document.

Having said that, he asked that I allow the one reference to the travel fact that Michael traveled to Thailand at a time when somebody associated with WikiLeaks was allegedly in Thailand. And, Mr. Denton, I would like your position on that, namely, if there is an admissibility issue; and if there isn't, whether there might be a stipulation to be had that would substitute for this document.

What are your thoughts?

MR. DENTON: Your Honor, I think it is, in a traditional sense, it is hearsay. [redacted] I think there is a stipulation to be had to that effect.

The only thing I would note is that we would probably suggest some additional language taken from earlier in the memo because, while that stipulation may be entirely appropriate, the start of the memo makes perfectly plain that the concern about Michael is not a concern about his having committed the theft, it's about his not reporting his awareness of what the defendant had done. The defendant is referred to in the memo as KP or Kinetic Piranha. So I think whether we characterize it as a rule of completeness type thing, if we are going to proceed by stipulation, some balancing may be appropriate, and we are happy to take the pen on trying to craft something that includes what both parties would like to use from the document.

THE COURT: Mr. Schulte.

THE DEFENDANT: I think it's more than that. The document specifically states -- it's about Michael. At the very top, it's a ruling as to whether he is a danger to the CIA or a danger to his security clearance or access to classified

information. So to the degree that the government just said, oh, they are just concerned about Michael's relationship with me, this is well after the fact and it's not just about that. It talks about a lot of different information, specifically about Michael and his accesses and his - I think it quotes peculiar or suspicious behavior on DevLAN, other issues.

So, I think simply -- if there is a stipulation, stipulating just to the fact from the memo. It doesn't have to say whether or not Michael is -- whether or not the CIA is even suspicious of Michael or anything to that degree, but simply the fact that, whatever the exact statement is, that on such and such a date Michael traveled, and at the same time a Wikileaks affiliate traveled [redacted], something like that.

THE COURT: It seems like the devil may be in the details here. The first step is seeing if you can reach agreement on something, and I am leaving it to the government to propose what it thinks should be, in fairness, included.

So can I leave it to you to try to sort something out, with the understanding that some form of a stipulation that is a substitute for this memorandum as a whole and references the Thailand travel would be used? And if there are disputes over what else should be included in the stipulation, I will resolve those when you guys have tried to hash it out yourselves first.

Does that make sense?

MR. DENTON: We can certainly do that, your Honor. I

think, not to ignore it, we do still have a relevance objection on it. I think the fact of overlapping travel after the leaks had already started is not necessarily relevant to anything. I went to London in March of 2017 where Julian Assange was located. I don't think that makes me a suspect in the leaks. So I think what goes in here may, as you say, have the devil in the details, but the relevance I think does seem a little far afield.

THE DEFENDANT: I think the Wikileaks disclosure wasn't completed yet.

THE COURT: Mr. Schulte, I got it. I think it's not a particularly strong piece of evidence. I think it's easily disposed of. But I am inclined to think that Mr. Schulte is entitled, because the leaks were ongoing, to at least make the point. More to the point, it appears in a government document.

So what I would propose is some form of stipulation to the effect of, in a memorandum, or perhaps something, after Mr. Schulte was identified as a suspect, this person was interviewed about his connections with Mr. Schulte and his -- I don't know. I am going to leave it to you guys to try to sort it out in the first instance, but perhaps describing what the nature of the document is.

And in this document, the government noted that he traveled to Thailand at the same time as somebody from Wikileaks traveled, and obviously it's specifying the times in

the middle of the ongoing leaks. It seems like it would allow Mr. Schulte to make the principal argument that he wanted to make from this document.

So, again, recognizing that there may be some further resolution required on this front, I will treat that issue as tentatively resolved -- that is to say, the memorandum won't come in and some form of a stipulation will.

MR. DENTON: I think the only thing we would say there, unlike most stipulations, we think that this should fall within the realm of the other memorandum, which is that the defendant has to call an appropriate custodian. The stipulation is a substitute for the document. We can either have him read it or not, but in order for it to come in, there has got to be a witness who is going to talk about it.

THE DEFENDANT: If the parties are going to disagree to a stipulation, otherwise the memo, I can introduce that through -- it's a business record from the CIA. I don't need to call a witness to introduce a business record.

THE COURT: You do. As we discussed on Friday, the business record rule requires the testimony of a custodian who can testify to the foundational requirements. Having said that, if Mr. Schulte demands that a proper custodian appeared to testify -- I think the government offered on Friday to make that person available -- it seems like the easier course here would simply be to work that into the stipulation rather than

calling a witness to say that there is a document, it appears in the government's files, it's kept in the ordinary course of business, and then, without identifying or introducing the document, then offering a stipulation that provides whatever information is included in the stipulation. I would think that the more efficient thing would be to just have a single stipulation that covers all of that.

Mr. Denton.

MR. DENTON: The only appropriate custodians for these documents are from [redacted] who maintains the records, and, in fact, a relatively limited subset of people who actually saw these records at all. And all of them would be in a position to offer explanation, as the government's rebuttal witness did at the last trial, about the records themselves and specifically why they don't mean what the defendant has asserted they do. So we think the appropriate course here is to have a live witness custodian.

THE COURT: Well, tell you what. Try to sort it out. If it doesn't go in a stipulation, then Mr. Schulte can demand the live witness custodian, the government will make that custodian available, and as ridiculous as that would be, we will go that route. The alternative would be, if the stipulation would suffice, the government can always call as a rebuttal witness the custodian to put it in proper context. But it also may depend on what goes into the stipulation,

because if there is not much about the document other than the travel fact and what the document is, then perhaps there is no need for it to be put in context. But recognizing that there are some big issues that need to be resolved, and in that sense this issue may not be put to rest, I will leave it there for now.

I was prepared to go through the remainder of Mr. Schulte's, I think it's May 23rd Section 5 notice. My concern is that he obviously hadn't seen the government's May 31st response to that until earlier in this proceeding so I am not sure what to do on that score.

The only thing that I think may require some discussion is the government proposes -- in fact, why don't I do this. Mr. Schulte, if you turn to pages 10 through 12 of the government's submission, the portions addressing the file listing from the Brutal Kangaroo stash repository. The government proposes a stipulation as a substitute on that issue as well. So why don't you just read through that and we can address that now. The rest of this maybe I can table for later or we can get through the witnesses and see how much time we have remaining.

THE DEFENDANT: I have read through the issue here.

THE COURT: Keep your voice up.

THE DEFENDANT: So I think, as far as the government's claim that the source code is classified, these are names such

as shatteredassurance.CPP. So I think at least the government should provide the listing of files in the SCIF in a classified format so then we can potentially go over it further.

I think the issue here is the government's stipulation doesn't really explain the layout of the repository.

So the stash repository is set up in such a way, and based on the list of files, that you can't simply do this, you can't simply take this project out.

So the whole point of this issue in the testimony is that the management and other individuals are stating this -- as the government says in footnote 2 -- Oh, you can just take this out and create another project or something, but that's not actually true. I don't know whether any of the witnesses -- only [redacted] may know the actual specifics of the repository, but he may not know. So if I was able to show the witness the listing of files, then I can elicit testimony from him that this is not possible and what the government is claiming or what the managers are trying to say is simply not a possible scenario.

So to the degree that the government is saying any of the files are classified, we could look to potentially redact or change the names. But for the most part, I wrote the tool so I know the names are not classified names. They are just literally names of the tool. Brutalkangaroo.CPP, it's a source file, and other source files like that. Those are not

classified. And to the degree the government says any of those files are classified, I think the simplest solution is change the name to something -- that's what they have done to all the projects before. So some simple substitutions like this, then it doesn't implicate any classified information, which I don't think is really implicated at all in generic names anyway. But the point is I am trying to get the structure, the file structure of this repository, to introduce the facts that I need to introduce.

THE COURT: I guess that's what I am trying to understand, what are the facts that you need to introduce? My understanding is that it was to establish the fact that you had reason to be within the Brutal Kangaroo repository, that is reason to access it, as a way of rebutting the argument that you were accessing something that you had no business being in. It seems to me that the government's proposed stipulation provides you that. What else is it that you're trying to establish?

THE DEFENDANT: So the only issue with the government's stipulation is the sentence here: A user with read only access to Brutal Kangaroo repository would be able to copy the Shattered Assurance code and create the new staff repository. That's false. And that's what the layout would show, that you can't do that, you have to copy -- you would basically have to copy the whole thing and replicate the whole

thing.

This gets into a back and forth between management, where management is saying basically what the government is saying here. That, Oh, you should have known better, all you had to do was take the small little file and then create your own repository. But that wasn't true. You needed the entire thing. And it doesn't make sense to copy the entire thing.

I think that's a disagreement between -- I don't know what the government's position is. At trial, the government took the position with management, who is basically saying, oh, no, you could do it this way. But it's not true. And the layout of the repository would show that that's not true. So I think the problem is a dispute with the facts. Someone like their own witness, if shown the repository and the layout, would be able to confirm my version of the facts and reject the government's own version.

THE COURT: So, Mr. Denton, I guess my question for you is, why do we need the second sentence of this proposed stipulation at all?

MR. DENTON: I gave Mr. Schulte my copy. So I am going off memory here.

MS. SHROFF: Now he has made notes.

THE COURT: This whole thing reads: "As of June 22, 2016, the source code for the tool known as Shattered Assurance was a part of the Brutal Kangaroo repository on stash and could

be accessed only through the Brutal Kangaroo stash repository."

So that's the first sentence. It seems to me that provides what Mr. Schulte principally wants, which is an explanation of essentially why he still had some right, if you will, to be accessing the Brutal Kangaroo stash repository, because he was permitted to still be working on Shattered Assurance, so he claims.

It seems like the sentence second which reads: "A user with read only access to the Brutal Kangaroo repository would be able to copy the Shattered Assurance code and create a new stash repository, to which that user would have administrator access, but would not be able to alter the code in the Brutal Kangaroo repository or change the permissions for other users of that repository." That seems like something that the government could elicit if there is a need to -- that's sort of the government's theory and it sounds like it's disputed, and in either case, you can elicit from your witnesses what you want with respect to what could or couldn't be done in the repository. Am I wrong?

MR. DENTON: No. I think that works, your Honor. Like I said, trying to do this orally is a little bit tricky. I think that probably works.

THE COURT: Mr. Schulte.

THE DEFENDANT: Yes. That works for me. That's all I wanted.

THE COURT: Great. As a substitute for, I think this is C2 in Mr. Schulte's notice of May 23, we will have a stipulation with just the first sentence of the government's proposed stipulation and that will resolve that issue.

We have only about half an hour remaining. I would like to make the best use of our time and also discuss how we are going to resolve anything that remains unresolved and anything that requires further discussion.

Let's talk about the latter first. It seems to me there are a couple of options. One is we could schedule another proceeding on Friday. I think they are all classified issues so it would be a classified proceeding. We could schedule one for early afternoon on Friday. The other option, as eager as I am to keep things moving once we have a jury, would be to do jury selection on Monday, and depending on whether we finish or not, we could either do a classified hearing on the morning of Tuesday before we proceed with openings or finish selecting a jury on Tuesday, if we are still going, and do a classified hearing on Tuesday afternoon, followed by openings on Wednesday morning. Bottom line is we could leave the rest to be resolved after the jury is selected but before we open.

Any thoughts on either of that? Either legal issues, practical issues, or trial preparation issues?

MR. DENTON: I think, your Honor, the bulk of the

remaining issues deal with the defendant's, I think fifth Section 5 notice, all of which I think the government has Section 6(a) objections to that were articulated. Technically, that is something the Court has to address in writing. It doesn't require much writing. But I wonder whether we really do need another proceeding. I think to the extent that the Court has the defendant's submission and the government's submission, it may be the sort of thing where we would just be happy for the Court to rule and go from there.

THE COURT: Mr. Schulte.

THE DEFENDANT: We are not sure if the hearing is actually required or needed, but we suggest -- Friday is my last SCIF day. I really need to be there. So we would suggest doing it after the jury selection and before the opening arguments. The trial hasn't technically started until opening, right?

THE COURT: I will tell you what. It's possible that we could do both of these things, which is to say, Mr. Schulte, why don't you, having now been given the government's May 31st submission, I will give you an opportunity to address any of the remaining issues by Friday and I will consider your submission. If I can resolve it on the papers and issue a ruling under 6(a), then there is no need for any hearing whatsoever, and perhaps that can be done before we even begin jury selection. If there is a need for a hearing or further

discussion, then we will convene either Monday morning before jury selection or after a jury has been selected. But I can't imagine that the statute is so rigid that it requires us to do it before we do jury selection.

Mr. Denton.

MR. DENTON: I don't have any particular objection other than to note that the Court's order regarding this on May 25th set a date for the defendant to respond of Monday, June 6.

So, again, putting aside the defendant's failure to sort of raise his view that he didn't get it, he had a deadline that came and went. One of the big issues here is the deadlines that come and go. And doing a Section 6 proceeding on the eve of trial is very much not what CIPA contemplates. So we will do what we have to do, but I just wanted to emphasize the government's view on that.

THE COURT: It may not be a major concern. If I agree with your arguments under 6(a) and that resolves it, then there is no cause for complaint. In any event, since Mr. Schulte didn't see it, and putting aside that he could have raised that concern earlier, I will give him until Friday to submit a response to it and I will at least consider it. And in that response, Mr. Schulte, you are welcome to address why I should consider it even though it is technically untimely. But we will proceed in that fashion.

I think that means the only remaining issue to discuss

today is the witness issues.

One, I received a letter from Mr. Schulte *ex parte*, or it maybe copied some CIA wall counsel, I am not quite sure what this notation means, but concerning the CIA's outreach to subpoenaed witnesses, and in particular the five witnesses who are identified. I don't know the best way to proceed on this. The government is obviously present. I don't know if the CISO who is here today is in a position to even speak to these issues. So I am open to suggestion. There is no request in here except to direct the CIA and the CISO to, quote unquote, act expeditiously, which I have already done.

Mr. Schulte, do you have any thoughts or requests on how to proceed with this?

THE DEFENDANT: So standby counsel advises as of last night she checked again and a majority of these witnesses, there still hasn't been any response. I just note for the Court that one of them I specifically brought up with the CISO like eight months ago because we had the same issue before the first trial, and I said we really need to speak with this witness. We didn't get a chance to even do anything at the last trial. I have been talking about this specific witness multiple times with the CISO. So I don't know how to proceed from now. I don't know how we are able to contact these witnesses.

THE COURT: I would note that you didn't raise it with

me. So to the extent that you have been asking the CISO for something for eight months, if you weren't getting what you needed, it was incumbent upon you to raise it with me in a more timely fashion.

Having said that, which witness number are we talking about on that score?

THE DEFENDANT: It's the one that says we have never gotten any response at all from him.

THE COURT: I don't actually see anyone who fits that category.

THE DEFENDANT: Is there a way that the trial team can step out for a moment and we can go through it?

THE COURT: Sure.

Any objections?

MR. DENTON: No, your Honor.

THE COURT: Why don't you step out and in a couple of minutes we will have you come back. I would like to make as valuable use of our remaining time as we can.

(Continued on next page)

(Government counsel and team enter courtroom)

THE COURT: So the last item on the agenda is the 40-some-odd witnesses that the defendant has subpoenaed and whether there is a basis to quash the subpoenas or address this pretrial.

I guess one question I have is, how much of this needs to be resolved today or is this something that we could take up in the first few days of trial, whether we delay things or just deal with it at the end of a day trial or some other thing? I sadly expect that it is going to require going through the list with some level of detail. Having said that, or before I hear from counsel on that, let me say a few things.

First of all, the defendant's most recent submission, which was made *ex parte* again, but I think by invitation from me, does identify four new witnesses that he is withdrawing the subpoenas as to. So the seven, I think total, are as follows: [redacted] and [redacted]

Three of those we already knew about. Four are new. So that's seven that we can take off the list.

As to the remainder, I will tell you that I am prepared to grant a motion to quash as to at least some of these. A huge number of them are basically proffered for the same point, which is basically that the DevLAN system was insecure and a lot of people had access to it, it was the,

quote unquote, wild west or what have you. There may be a basis to call a couple of witnesses on that. I sort of expect that point will probably come out in cross of some of the government's witnesses, and in that regard, there may be no need whatsoever for defense witnesses on that score, but there certainly is no need to call 20 witnesses to proffer the same thing. And although I know Mr. Schulte has complained that he doesn't know who his best witnesses would be, that's not the purpose of a subpoena. A subpoena secures somebody's testimony at trial and it doesn't require anybody to be interviewed; and in that sense, it doesn't guarantee that he can choose his, quote unquote, best witness.

So, from that standpoint, I am inclined to say that you should be severely curtailed in the number of witnesses that he would call for that purpose. I think some of the witnesses that I have already permitted, and there were five that I have already ruled on, do cover that ground, and in that sense, it may be that none of the others should be permitted at all, and there are plenty on this list who were identified simply for the proposition that DevLAN was an insecure system or what have you.

Second, it strikes me that from the proffer made several of the witnesses, separate and apart from that, there are some issues of relevance, some of the testimony its relevance is not immediately apparent to me, although perhaps

Mr. Schulte could elaborate or explain. There are issues of speculativeness. To the extent that the proffer is made that they, quote unquote, believed that the leaker could be someone else, or that it could have been someone from the outside or someone with access to this system or that system, I don't know why a witness would be permitted to offer his or her speculation on that issue. That's not permissible testimony. And relatedly, it seems like a number of these are essentially trying to use fact witnesses as expert witnesses, that in essence is trying to elicit from some of these witnesses that in their expert opinion the leaker could have been someone who had this access, or this access, or someone outside or inside or what have you, and if they were not properly noticed as experts, and gather they were not, it strikes me as that is impermissible testimony as well.

The last category, several of them are proffered for the specific testimony concerning specific potential alternative suspects. And in light of the law that the government cited with reference to the Michael memorandum -- I don't know if there is more to proffer on that basis -- I don't think that testimony is proper either. There has to be a nexus to this case. There has to be some specific basis to proffer that person. As an alternative suspect is not sufficient to offer a fact witness's speculative belief that the leaker might have been X, Y or Z. There has to be some factual basis to

make that identification.

All of which is to say, I think this list is rife with problems. I am happy to go through them. I am happy to let Mr. Schulte, having heard that, sort of go back to the drawing board and pare this down to a more reasonable list that I am more likely to bless. I am happy to go through it one by one, but not today since it's already 2:10, 2:15. I am open to your suggestions. I again understand that the government wished for these things to be resolved before trial. They were only raised recently and I really haven't had enough time to go through it, but I am welcome to your thoughts on the timing and process.

MR. DENTON: Your Honor, let's start with a purely logistical question. With respect to 12 or 13 people that the government has identified as being in particularly sensitive positions, we are essentially out of time to make arrangements to get them here. We will do what we have to do, but I think there is a real cost to not resolving those now.

THE COURT: Can you remind me who those are? Some of them I have already resolved.

MR. DENTON: So the five we have got covered. They will be here. And I can say with respect to [redacted], we have confirmed since this morning she will be available. I think the only accommodation we would ask is that we do our best to kind of pick a day for her so that we can minimize the amount

of travel [redacted]. But she will be here.

THE COURT: I am sure we can do that, and I am prepared to take her out of turn, if need be, [redacted]

Who are the others?

MR. DENTON: I'm sorry, your Honor. I don't have the list with me. We had identified them to the defendant. We have a continuing objection to the defendant making these proffers *ex parte*. These are evidentiary issues. The government has filed a motion *in limine* and the government is entitled to know what evidentiary basis the defendant proffers for the admissibility of evidence in this trial.

So we do not think that proceeding *ex parte* with this is appropriate, and it limits our ability to frankly give on some of these people. There are some proffers where we say, fine, we are not going to fight about this, we will bring them here. That's what we did the last time. We have tried to force this into a posture where we would do exactly what happened, which is the defense would make a more reasonable proffer as to who would they actually want. The defendant keeps refusing the opportunity.

THE COURT: I understand.

Am I right that [redacted]

[redacted] and [redacted]

MR. DENTON: I think that's right, your Honor.

THE COURT: Mr. Schulte, let's try and resolve those eight now, and then let's table the rest for later, whether that's Friday or early next week.

THE DEFENDANT: Starting with the first one, [redacted] we are not sure what the difficulty with her is. We were able to speak with her. And she is in DC. She is a [redacted] So it doesn't seem there is any difficulty for her. But after questioning her and coming up with a writing of her testimony, we definitely intend to call her as a witness.

THE COURT: She is the second.

Mr. Denton, do you have reason to question that she is in DC?

MR. DENTON: I think the issue is not where people are; [redacted]

THE COURT: Why would [redacted] who is in DC be complicated to get to New York? They can certainly travel within the United States. No?

MR. DENTON: They can. I think the issue is, again, in dealing with the association with this trial, I can't pretend to understand all the specifics, and frankly we have not been informed of all the specifics, precisely because Mr.

Lockard and I are very publicly associated with this trial. So my understanding is that that is the list of people for whom it was considered difficult to make travel arrangements.

THE DEFENDANT: She was here the last time and there was no issue, the government didn't raise any issues about that. So to the degree that these witnesses are in DC, or otherwise can easily make the trip, I don't see that as a burden for the government. We should be focusing on, if some of these witnesses are overseas, those are the ones we should really be prioritizing, right?

MR. DENTON: Your Honor, it's not a question of can we. It's that we need time. And contrary to the defendant's suggestion, we screamed bloody murder the last time because it required moving heaven and earth to get people here in the way that the defendant suggested.

THE DEFENDANT: It's an Amtrak train ride. It's not like these people are having to come from overseas and deal with the issues with [redacted] and other kinds of [redacted]. [redacted] So I don't think that that alone is justification for burdensome issues from the government.

THE COURT: Well, here is the problem. I don't have time to do this right now. So I think the government has a couple of choices. It can take the steps necessary to have

these people here, recognizing that it may all be for naught if they don't end up testifying, whether that's because I order it or Mr. Schulte decides not to call them. We can take this up on Monday or Tuesday. You can identify a few that are particularly concerning. I am open to suggestions. We can reconvene on Friday to go through this one by one. I can't imagine that a day and a half makes a huge material difference on this front.

MR. DENTON: I think actually having it done on Friday would make a material difference, just in terms of our ability to make arrangements over the weekend while the trial team and others are not physically in trial for the entire day. I hate to burn the time on Friday, but I think that the best course would be for the Court to provide the government copies of the defendant's *ex parte* filings so that we can take a position, and then we will go through the list on Friday when the Court is available.

THE DEFENDANT: Friday is my last SCIF day and I already have so much to do, and now there is another deadline that the Court has for that letter. With trial on Monday, it's just going to be extremely difficult for me to -- there is at least a couple of weeks before the government's case, and the two or three days we have next week, I think there is plenty of time in between to be able to work it out.

THE COURT: Let's reconvene on Friday at 1:00. We

will do this as quickly as we can. I also, upon reflection and having reviewed the list in detail, I don't think that this meaningfully reveals anything about Mr. Schulte's defense strategy, and for that reason, I will direct that it be disclosed to the government promptly so that the government can go through it, and perhaps streamline what we need to go through and resolve since it may consent to some of these people, and if not, can assist me in paring it down on the grounds that I have suggested.

Mr. Schulte, in the meantime, I would ask you to go through this, and to the extent you are willing to withdraw additional ones it will make this task a lot easier. You're not going to call all these witnesses, I assure you of that. There is no need to call more than one or two witnesses to talk about the vulnerabilities in the DevLAN system. And I suspect that that will be a ground that is amply covered even in the government's case-in-chief, and in that regard there may be no need for any witness. But there are witnesses who have other things to say and can also say that, and for that reason, I think if that is all the witness has to say, I am inclined to say they should not be testifying as a witness at this trial.

MS. SHROFF: May I just have one second with Mr. Schulte?

THE COURT: You may. But I really need to go.

THE DEFENDANT: Judge, if there is any way at the

beginning of Friday I can work through -- if we just work on the few, the eight or so the government has specified, we give them the list, they submit their submission, and then Friday morning we can go through it and hopefully work it all out so we don't need to come back. Would that work out? Friday morning at the SCIF.

THE COURT: If you all can work it out and you report back to me that there is no need for a hearing, great. I am more than happy to do that. I have a sentencing Friday morning. I have another criminal appearance Friday morning. And I may be continuing a hearing that otherwise will take all day tomorrow and Friday. So I have even less time than any of you guys have, and I am not happy about this. But it seems to me that we need to resolve this, and by doing this *ex parte* you have prevented the government from seeing it. I am not going to allow that any longer, but the fact of the matter is we need to resolve it.

I don't have a copy of that list that is not marked up with my own notes. Ms. Shroff, can you get a copy to the government promptly? What is the best way to arrange for that?

MS. SHROFF: Mr. Schulte would have to be taken to the SCIF now.

Your Honor, what I was trying to get Mr. Schulte to tell the Court, may I?

THE COURT: Yes.

MS. SHROFF: I think Mr. Schulte will have largely resolved the issues on the 8th. [redacted] would be the first person he would actually call. And there is one other person whose name starts with [redacted] So the government is on notice already that they need to make travel arrangements for those two individuals.

To the extent there are any others that we need to litigate about, we can certainly do that on Monday after the jury is picked, because none of these witnesses are going to be called for at least another two weeks, and the government has the 20th and the other two days that the Court is not sitting to make whatever travel arrangements they need to make for a person to come from Washington or Virginia to New York. It seems like a very simple travel itinerary to put in place, even if you are traveling [redacted] I am sure all of these people travel and take their kids to, I don't know where people take their kids these days, Five Flags or Six Flags.

THE COURT: Be that as it may, we will reconvene on Friday at 1:00 if the parties haven't resolved it before then.

The government is to get a copy of this list no later than tomorrow. I assume if Mr. Schulte can be brought to the SCIF now and they can get a copy now, all the better. But in any event, certainly by tomorrow they should have it.

Standby counsel, if you can facilitate that, I will appreciate it. And if you resolve it before Friday at 1 p.m.

that will make me thrilled. Just let me know and then we can cancel that proceeding.

See you on Friday unless you manage to resolve it. Otherwise I will see you on Monday in 23A at 9:30.

(Adjourned)